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In The

Supreme Court of the United States

October Term, 1982

RICHARD L. STACK,

Petitioner,

vs.

CAPITAL-GAZETTE NEWSPAPERS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ruling of the Maryland Court of Appeals, in upholding the grant of a directed verdict in the trial court, has tilted the constitutional balance created by New York Times v. Sullivan and its progeny, against libel plaintiffs who are public figures, by permitting the usurpation of the jury's function of evaluating the defendant's all-important state of mind.

2. Whether the ruling of the Maryland Court of Appeals has misapplied decisions of this Court, as well as of federal courts regarding the propriety of resolving libel cases of plaintiffs who are public figures, by directed verdict, as compared to summary judgment, where the plaintiff has presented substantial evidence of "actual malice."

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Petitioner, Richard L. Stack, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Maryland Court of Appeals entered in this proceeding on June 4, 1982.

OPINION BELOW

The opinion of the Maryland Court of Appeals, reported at Md. ,445 A.2d 1038 (1982), appears in Appendix A hereto. The opinion of the Maryland Court of Special Appeals, reported at 48 Md. App. 429, 427 A.2d 1066 (1981), appears in Appendix B hereto.

JURISDICTION

The judgment of the Maryland Court of Appeals was entered on June 4, 1982. This petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States:

"Congress shall make no law respecting an establishment of religion, or

prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

This is a civil action by Petitioner Richard L. Stack (hereinafter referred to as "Mr. Stack"), against a publisher, Capital-Gazette Newspapers, Inc. (hereinafter referred to as "Capital-Gazette"), seeking damages for libel. The Declaration of Mr. Stack charges that he was defamed by an editorial published in the October 26, 1978 edition of the "Maryland Gazette" and in the October 27, 1978 edition of the "Evening Capital", both of which are newspapers owned by Capital-Gazette.

Mr. Stack, a practicing attorney, was the Republican candidate in District 32 for the Maryland Senate in the November 1978, general election. His Democratic opponent was H. Erle Schafer, who won the election and presently serves in the Maryland Legislature.

Capital-Gazette, a Maryland corporation, published in 1978 and continues to publish two newspapers, the Evening Capital and the Maryland Gazette. Capital-Gazette's agent and executive editor, Edward D. Casey, was in 1978, and still is, responsible for the editorial content of said publications. John Farrell, an agent of and reporter for Capital-Gazette in 1978 was assigned to cover Mr. Stack's campaign and had in-depth knowledge of that campaign.

Pursuant to its editorial policy, Capital-Gazette conducted an editorial

interview of Mr. Stack and his opponent shortly before the election. Present were Mr. Casey; Mr. Farrell; Ellen Sherman, another reporter; Robert Goodman, editor of the Maryland Gazette; Mr. Stack; Mr. Stack's campaign manager; Mr. Schafer and Mr. Schafer's son. At said interview, which took place at Capital-Gazette's offices, various issues were discussed by Mr. Stack and others. Mr. Stack advised those present that he had the support of Tyras Athey, his opponent's ticket-mate, and of Michael J. Wagner, whom his opponent defeated in the Democratic primary election. Importantly and more specifically, Mr. Stack, when challenged by Schafer to disclose names of Democrats who had "solicited him", responded that he had been called by Athey, had met with him, and had been told by Athey that Athey would rather

Mr. Stack win the general election than Schafer. Mr. Stack further advised those present that he had been contacted by Wagner, that Wagner also advised Mr. Stack that he would prefer Mr. Stack to win the general election, and that Mr. Wagner had given Mr. Stack certain "damaging" photographs to use as he wished in his campaign against Schafer. Mr. Stack did not claim the current support of Athey and Wagner, as a review of his testimony will disclose.

The day after the editorial interview, Mr. Casey met with Athey, Wagner and Schafer. Also present was Mr. Farrell, Capital-Gazette's Agent and reporter. At said meeting, Athey and Wagner denied any current support for Mr. Stack. Mr. Stack was not invited to this meeting and was not given any opportunity by Mr. Casey or any agent

of Capital-Gazette to comment on or rebut these protestations of non-support.

On October 23, 1978, prior to the first publication of the defamation editorial, an article, entitled "Mud Flies in Schafer-Stack Race", (Appendix E) written by Mr. Farrell, was published as the headline story on the front page of the Maryland Gazette. The article was subsequently published on the front page of the Evening Capital. Said article substantiated the statements of Mr. Stack concerning his statements regarding his contacts with Athey and Wagner.

Capital-Gazette published the following editorial on October 26 and 27, 1978, in the Maryland Gazette and Evening Capital, respectively:

DISTRICT 32

THIS SENATE race in north county has been the biggest disappointment of any race in the area. What should have been a responsible battle between two intelligent men has turned into one of gutter politics all because of the tactics of Republican challenger, Richard Stack.

After the smoke of their primary battles had cleared, we expected a race between Stack and H. Erle Schafer, two intelligent, personable candidates who we thought would discuss the issues which would affect the people of this northern Anne Arundel County district.

Instead, Stack chose to take the low road - a la former Sen. Joseph McCarthy. He had been conducting a campaign of smears and innuendos in attempting to divide the district's many democrats.

Stack has refused to discuss the issues. While Schafer answered the many questionnaires sent out by more than 20 political organizations, Stack not only refused to answer the questions, he demanded that the organizations provide him with Schafer's answers.

He insinuated that Schafer's Democratic primary opponent, Michael Wagner, was supporting him in the general election. He even said that Schafer's running mate, Del Tyras Athey, was on his side.

Both allegations have proven to

be false - as have many other things Stack has said in the campaign.

Schafer is a former county councilman and is on leave of absence from his county job as Glen Burnie urban renewal director. He certainly has more experience in government than Stack and from what we have seen in this race is a more responsible human being.

The overwhelming choice here is Schafer. Stack does not belong in public office.

Because of the defamatory editorial, Mr. Stack filed suit in the Circuit Court of Anne Arundel County, Maryland on November 1, 1978, alleging that Capital-Gazette had knowingly, falsely, recklessly and maliciously printed and published certain statements to the injury of Mr. Stack. A jury trial was prayed. Importantly, the suit was filed five days after the defamatory editorial was first published, immediately placing Capital-Gazette on notice that it would be required to substantiate its statements.

The case was tried by jury on April 1, 2, 3 and 7, 1980, Judge Raymond G. Thieme presiding. At trial, Mr. Stack presented substantial evidence refuting the allegations contained in the editorial. Mr. Farrell, who was at the time of trial, no longer an agent or employee of Capital Gazette, testified from personal knowledge that he knew of no instance during the campaign where any statement made by Mr. Stack had proven false. He also reaffirmed the validity of the "Mud Flies" article. Furthermore, it was shown that Mr. Stack did discuss the issues and did not conduct a campaign of smears and innuendos.

More importantly, when Mr. Casey was questioned as to the "many other things" Mr. Stack had said which proved false, he could remember none. He testified that he based portions of his

editorial on three political advertisements of Mr. Stack, yet it was proven, that two of the ads were published for the first time after the defamatory editorial was published. Succinctly, Mr. Casey's credibility was put in issue.

At the close of Mr. Stack's case, Capital-Gazette moved for a directed verdict; the motion was overruled. At the close of all of the evidence, Capital-Gazette again moved for a directed verdict; Judge Thieme granted the motion.

Mr. Stack filed an appeal to the Maryland Court of Special Appeals, contending that sufficient evidence of actual malice had been presented, and that the grant of direct verdict was therefore improper. The Court of Special Appeals, in a unanimous decision, reversed Judge Thieme and remanded the case for a new trial.

Capital-Gazette filed a timely Petition for Writ of Certiorari to the Maryland Court of Appeals, which granted the Petition on July 15, 1981. Following the filing of briefs and oral argument, the Court of Appeals entered its judgment on June 4, 1982, reversing the Court of Special Appeals in a 5-1 decision. Judge Harry A. Cole file a dissenting opinion, stating that the evidence presented gives rise to a jury question. Additionally, Judge Lawrence F. Rodowsky disqualified himself from sitting on this case, having been counsel of record for Capital-Gazette prior to his appointment to that bench.

The questions raised in this Court were first raised in the trial court by Demurrer to Declaration of Capital-Gazette, which was overruled by a Memorandum and Order of Judge Raymond G.

Thieme; a copy of Judge Thiem's Memorandum appears in Appendix C hereto.

Subsequently, these questions were raised at trial by Motion For Directed Verdict At The End Of Plaintiff's Evidence. Judge Thieme, after holding the matter sub curia, overruled the Motion, stating on page 382, Volume I of the joint record extract, as follows:

"The Court has had an opportunity to consider the Motion, and viewing the evidence most favorably in light of the Plaintiff, the Court feels it has to overrule the Motion. The Court will overrule the Motion."

The questions were raised again by Motion For Directed Verdict At The End Of All The Evidence. Judge Thieme granted this Motion. His ruling is printed on pages 492-493, Volume I of the Joint Record Extract; a copy of Judge Thieme's ruling appears in Appendix D hereto.

The questions were next raised by Plaintiff's timely Motion for New Trial, filed on April 10, 1980. Judge Thieme's Order, denying said motion and filed on June 5, 1980, states:

"Plaintiff's Motion for New Trial having come before the Court for hearing, the proceedings were read and considered, counsel were heard in chambers, and after due consideration, it is this 4 day of June, 1980, by the Circuit Court for Anne Arundel County, ORDERED, that the Motion for New Trial be, and the same is hereby, denied."

Subsequently, questions were raised in a timely appeal by Petitioner to the Maryland Court of Special Appeals; a copy of the Opinion of that Court appears in Appendix B hereto.

Finally, in the Maryland Court of Appeals, these questions were presented for review; a copy of the Opinion of that Court appears in Appendix A hereto.

REASONS FOR GRANTING THE WRIT

THE USURPATION OF THE JURY'S FUNCTION IN EVALUATING THE STATE OF MIND OF LIBEL DEFENDANTS HAS FUNDAMENTALLY UPSET THE BALANCE SET FORTH IN NEW YORK TIMES V. SULLIVAN AND ITS PROGENY.

1. Evaluation of the Credibility and State of Mind of Libel Defendants Should be Made by the Jury Rather Than by the Trial Judge.

The propriety of dealing with defamation actions by directed verdict has never been decided by this Court. Nor has the appropriateness of disposing of such actions through summary judgment ever been directly considered. Nevertheless, in Note 9 of Hutchinson v. Proxmire, 443 U.S. 111, 120, 99 S. Ct. 2675, 61 L.Ed.2d 411 (1979), doubts

were raised about the "rule" whereby determinations of actual malice, as defined by New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686(1964), and its progeny, were to be made by summary judgment. The "proof of 'actual malice'," Chief Justice Burger wrote,"does not readily lend itself to summary disposition."

Defamation cases involving either public officials or public figures* should not be disposed of summarily because the defendants' states of mind are at issue. In balancing the

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* See Gertz v. Robert Welch, Inc. 418 U.S. 323 (1974).

First Amendment concerns for uninhibited, robust, and wide-open debate on public issues against the protection of the private personality,* this Court has required the trier of fact to evaluate the subjective state of mind of the defendants at the time of the defamatory publication.

In Poller v. Columbia Broadcasting System, 368 U.S. 464, 473, 82 S.Ct. 486 (1962), an antitrust case where state of mind was also in issue, this Court

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*See e.g. Rosenblatt v. Baer, 383 U.S. 75 (1966), where Mr. Justice Brennan wrote, at page 86, that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation."

held that summary judgment was inappropriate:

"We believe that summary procedures should be used sparingly...where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'"

Although this Court has not yet so ruled, it is only logical that the Poller reasoning be extended to New York Times libel actions and the case at bar. Despite the fact that witnesses are heard in cases resulting in directed verdict as opposed to summary judgment, if the jury is not given the opportunity to evaluate the credibility of those witnesses, as well as their states of mind, it is as though that jury had not sat at all.

2. If The Trial Judge Is Permitted To Evaluate The Credibility And States Of Mind Of New York Times Defendants, Thereby Usurping An Important Function Of The Jury, Recovery By New York Times Plaintiffs Will Be Precluded Except In The Unlikely Event That Said Defendants Admit To Their Knowing Falsity Or Their Reckless Disregard For The Truth.

When the evidence that was produced at the trial of the case at bar is considered, it is difficult to understand what else the plaintiff might have presented to get his case to the jury. In nearly four days of testimony, including that of the Defendant's agents, the Plaintiff either refuted or, at the very least, raised the issue of credibility for, nearly every allegation of fact contained in the

subject editorial. Furthermore, in that the Defendant was unable to explain or produce the bases for its defamatory* statements, except for the testimony of the Defendant's agent that he believed the statements to be true, the mental state and credibility, i.e. the actual malice, of the Defendant was called into question.

In St. Amant v. Thompson, 390 U.S. 727, 732, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), Mr. Justice White wrote that:

"The defendant in a defamation action cannot, however, insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was made in good faith." (Emphasis supplied).

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* See Judge Thieme's Memorandum and Order which appears in Appendix C hereto.

Yet, on the basis of the Defendant's testimony alone, the trial judge granted directed verdict for the Defendant.* Considering that a directed verdict was denied to the Defendant at the close of the Plaintiff's case, and also that the editor of the Defendant's newspapers was the only non-hostile witness called by the Defendant in support of its case, that this is exactly what occurred is all the more obvious.

If the Plaintiff had not presented any evidence of actual malice, he would concede that a directed verdict might be an appropriate means of disposing of his case, But such was not what

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* See Judge Thieme's ruling which appears in Appendix D hereto.

occurred in the case at bar, as the Plaintiff sufficiently and successfully refuted the defamatory statements made by the Defendant.

Regarding the assertion that the Plaintiff's allegations of support from Michael Wagner and Tyras Athey, members of the opposition party, were proven to be false, the Plaintiff presented a front page article (Appendix E hereto) published in the Defendant's newspapers immediately prior to the publication of the subject editorial. That article, which was written by John Farrell, one of the Defendant's agents, and admittedly read by Edward Casey, the Defendant's editor and the author of the editorial, prior to the publication of the editorial, verified the "false" allegations:

"Athey admits he did meet with Stack after calling the Republican in a fit of 'post-election emotion.' He says he has since reconciled his differences with Schafer and does not intend to help Stack in any way." (Emphasis supplied).

The article further stated:

"and Wagner admits that he did pass photographs to Stack but that he has since reached an understanding with Schafer, mindful of what happens to Democrats who get caught in the open supporting Republicans."

With respect to the contention that the Plaintiff had conducted a campaign of smears and innuendos and had refused to discuss the issues, the plaitiff offered the testimony of numerous witnesses, including the attorney for the Board of Election Supervisors, to successfully prove their falsity. But more importantly to the issue of actual malice, the Plaintiff showed that the Defendant

had no bases for these, as well as most of the other, contentions and thus must have fabricated them.

For instance, the Defendant published that "many other things Stack has said in the campaign" have proven to be false. Yet, when the author of that statement was asked to enumerate those things at trial, he could think of no other statement which proved to be false. At least one judge of the Maryland Court of Appeals attributed this inability to produce other false statements to the year and a half that elapsed between the publication of the editorial and the time of trial. But as has been shown by the Plaintiff, the original suit was filed against the Defendant immediately after publication and prior to the general election, thereby placing the

Defendant on notice that it would be required to defend its statements.

When pressed further for the basis of the "many other things" statement, the Defendant offered three political advertisements run by the Plaintiff. The tenuousness of that assertion was shown, however, in that the Plaintiff proved that two of those advertisements were run after the publication of the editorial.

At the very least, the credibility of the various witnesses, especially of the editorial's author, Edward Casey, was at issue. If the trier of fact were not convinced that the Defendant had credible bases for its factual statements, then it could have found that the Defendant published those

statements with knowing falsity or reckless disregard for the truth, i.e. with actual malice. But the trial judge, by granting the Defendant a directed verdict, virtually eliminated the issue of credibility and unjustifiably accepted the Defendant's feeble denials of malice. This is a direct contravention of St. Amant, supra, as well as of basic concepts of fairness. For to remove the issue of credibility from the jury, thereby permitting a defendant to merely testify that it believed what it published to be true, is to allow recovery for New York Times plaintiffs only when the defendants admit or confess their malice. In other words, never.

3. In Permitting New York Times Libel Cases to be Taken Away From the Jury, Despite the Presentation of Substantial Evidence of Actual Malice, the Maryland Court of Appeals Has Violated Its Own, As Well As Federal, Case Law.

Although Poller v. Columbia Broadcasting System, 368 U.S. 464, 82 S.Ct. 486 (1962) was not a defamation case, the Maryland Court of Appeals applied its reasoning to a recent libel and slander suit. In Berkey v. Delia, 287 Md. 302 (1980), at page 332, 333, the highest Maryland Court discussed the doubts that it had as to the propriety of summary judgment in cases involving the New York Times rule. Stating that the credibility of witnesses may not be weighed on a motion for summary judgment, the Maryland Court held that whether the plaintiff adduces clear and convincing evidence to support his action "must be determined by the trier

of fact who will weigh, compare, test, and judge its worth, considering it in connection with all the facts and circumstances presented in evidence." Since the jury, rather than the trial judge, is the trier of fact, it is thus not appropriate for the latter to usurp the former's legal function, whether by summary judgment or, as in the case at bar, by directed verdict.

Federal Courts have also considered this matter. In Goldwater v. Ginzburg, 261 F.Supp. 784, 788 (S.D.N.Y. 1966), a case precluding summary judgment, it was stated that libel actions are especially appropriate for trial to a jury. The court there noted that in England such actions are among the few actions which must be tried to a jury if one party so desires. And in Croley v. Matson Navigation Co., 434 F.2d. 73

(5th Cir. 1970), it was held that summary judgment should be used sparingly in actions involving state of mind as

"[m]uch depends on the credibility of the witnesses testifying as to their own states of mind. In these circumstances the jury should be given the opportunity to observe the demeanor, during direct and cross examination of the witnesses whose states of mind are at issue." (Emphasis supplied).

When evidence of state of mind has been presented at trial, bringing the credibility of witnesses into play, that evidence must be evaluated by the jury. This was the holding in Berkey, supra, despite the Maryland Court's refusal to entirely rule out the use of summary judgment in defamation cases involving the New York Times rule. Nonetheless, in the case at bar, the Maryland Court of Appeals allowed a trial judge to prevent the jury from making that critical evaluation. Succinctly, this flies

in the face of its own decision, as well as of a number of federal jurisdictions. At the very least, this Court is presented with both the confusion that exists with respect to this issue, and the opportunity to set a uniform policy regarding the propriety of a directed verdict in New York Times libel actions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Russell J. Bennett

For Petitioner